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Supreme Court of the United States

OCTOBER TERM, 1954

No. 52

DANIEL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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The judgment of the Court of Appeals was entered on February 26, 1954 (R. 264). A petition for rehearing filed on March 12, 1954 (R. 265-266) was denied on March 26,

1954 (R. 267). A petition for a writ of certiorari was filed on April 26, 1954 and was granted on June 7, 1954. The jurisdiction of this Court rests on 28 U.S.C. Section 1254 (1). See also Rules 37 (b) and 45 (a) of the Federal Rules of Criminal Procedure.

STATUTE INVOLVED

Internal Revenue Code:

Sec. 145. Penalties

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax,--*

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U.S.C. (1946 ed.) Sec. 145 (b)

(This section was superseded by sections 7201 to 7203 of the Internal Revenue Code of 1954.)

QUESTIONS PRESENTED

1. Was the net worth statement signed by the petitioner adequately corroborated in respect to the starting net worth?

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QUESTIONS PRESENTED

1. Was the net worth statement signed by the petitioner adequately corroborated in respect to the starting net worth?

2. Was the net worth statement signed by the petitioner admissible in evidence, and was the failure of the trial judge to hold a preliminary hearing on its admissibility in the absence of the jury improper procedure?
3. Was the Court of Appeals in error in basing the affirmance of the conviction on the statement, which may have been rejected by the jury, without considering the sufficiency of the other evidence?
4. Did the Court of Appeals ignore established standards of this Court in sustaining the conviction of the petitioner on a theory and an issue never advanced in the trial court and on which the jury received no instructions.

STATEMENT OF THE CASE

The petitioner and his wife Eva were indicted jointly (R. 5) in the United States District Court for the District of Massachusetts for violations of Section 145 (b) of the Internal Revenue Code for each of the calendar years 1946 to 1950 inclusive. Each count of the indictment alleged, in part, that the defendants did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by them to the United States of America by filing a false and fraudulent tax return wherein they stated that their total income for a certain calendar year was a certain amount, whereas they well knew that their net income was a certain larger amount upon which they owed an income tax larger than that reported. In answer to motions for particulars filed by the defendants, the United States Attorney filed answers stating that the United States relied upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion for each year (R. 9). These answers made the case what is known as a net worth case. It is believed that this case was the first net worth case

tried in the United States Court for the District of Massachusetts and also the first such case decided by the United States Court of Appeals for the First Circuit.

At the trial, the evidence on the issue of whether or not the petitioner received income beyond that reported on the joint returns of himself and his wife was entirely circumstantial, except for some uncertain testimony by a treasury agent as to an inconclusive verbal admission (R. 62). There was no direct evidence whatsoever of receipt by the petitioner of specific items of income which were omitted from pertinent tax returns. The evidence on the issue of whether or not the petitioner's net worth increased from year to year was entirely circumstantial, inasmuch as the net worth statement signed by the petitioner was treated at the trial as a joint statement (Govt. Ex. 20, R. 42, 123, 231-234). The use and proper characterization of that net worth statement is hereinafter considered in detail. The trial judge's charge to the jury left no doubt that the Government's case was built upon circumstantial evidence (R. 209, 211).

The joint nature of the charges stated in the indictment dominated the trial from start to finish, in that the prosecution and defense contested continually about the legal propriety of prosecuting the petitioner and his wife as if they were an entity by reason of their having filed joint tax returns (R. 12-14, 139-149, 206). The Government contended that where a return is filed jointly the amount of alleged unreported income of each co-defendant is not material to the issues (R. 12-13). It did not attempt to establish increases in the net worths of the individual co-defendants, but relied upon alleged increases in their joint net worth (R. 158, 166), as stated in the opinion of the Court of Appeals (R. 258). These joint increases were computed in detail on a blackboard which was placed before the jury (R. 217) and were charged against both defendants (R. 174).

The Government offered the testimony of twenty-six witnesses (R. i, ii), twenty-three of whom testified concerning banking transactions, acquisition of assets, and expenditures by the defendants. The other three witnesses were Treasury employees, one a special agent, one a revenue agent and the third a custodian of official records. Eleven categories of assets were listed on a blackboard which was placed before the jury (R. 217). The figures designated "Cash in Banks" were totals as of the end of each year of fourteen bank accounts which were listed on another blackboard (R. 218). Government evidence also described stocks and bonds bought through a brokerage firm, stock in a trust company bought at the time of its organization, U. S. Government bonds, a paid-up annuity purchased from the John Hancock Life Insurance Company, a restaurant whose corporate name was the Falmouth Bowling Club, Inc., a drug store, five parcels of real estate, furniture, autos and mink coats. Increases in the defendants' joint net worth as computed on the blackboard (R. 217) amounted to \$30,553.92 for 1946, \$45,877.12 for 1947, \$54,869.48 for 1948 and \$65,389.23 for 1949. No figures were included for cash on hand.

The petitioner's wife Eva owned all the assets, with three exceptions: a bank account in the Worcester Mechanics Savings Bank (R. 36, 38), a brokerage account at Paine, Webber, Jackson & Curtis (R. 117-120) and a parcel of real estate on Williams Street (R. 131). The evidence of ownership by Eva was usually incidental to testimony about dates and costs. But oftentimes it was substantial and definite; regarding her bank accounts, witness George turned the proceeds over to her and acted for her accommodation (R. 40); regarding the Valley Trust Company stock, witness Taylor discussed the investment only with her (R. 114); regarding the drug store, Eva was the partner

and received such distribution of profits as was made (R. 112, 114); regarding the paid-up annuity, the salesman "sold Eva" (R. 53); regarding the mink coats, they were paid for by a check charged against Eva's checking account (R. 34, 105). The only purchase with which the petitioner was connected was that of the Falmouth Bowling Club, in which instance he participated in the negotiations and contributed \$7,300.00 which was withdrawn from his savings account (R. 36, 48, 49, 110, 111). Regarding the securities in Eva's brokerage account, they were owned and bought by her, according to a stipulation between counsel stated to the trial judge and jury by the prosecuting attorney (R. 118). At no time did the prosecution challenge the fact of ownership by Eva of the assets of which she had title. Nor did it in any way endeavor to show that her ownership was nominal rather than beneficial.

Other Government evidence related to tax returns filed by the defendants, admissions made by the petitioner during two interviews with treasury agents and the circumstances surrounding delivery to an agent of a net worth statement signed by the petitioner together with a check payable to the Collector of Internal Revenue in the amount of \$15,000.00.

The joint returns of Mr. and Mrs. Smith were marked Exhibits 1-4 for the years 1946-49 respectively (R. 26, 219-229). For years prior to 1945, a search disclosed no returns for 1936-39, non-taxable returns for 1940 and 1942, a taxable return for 1941, a non-assessable return for 1943 and a refundable return for 1944 (R. 26-27).

The first of two interviews with the petitioner was on April 15, 1951 at special agent McMahon's office (R. 96). The petitioner was accompanied by his accountant Delaney. There was no stenographer present; the petitioner was not represented by counsel; the agent did not administer an

oath (R. 97). Its general purpose was to get the method of operation and background of the news service operated by the petitioner; McMahon didn't go into any detail as to the assets owned by the petitioner at the beginning of any particular period (R. 99). The petitioner listed about a dozen customers who purchased racing information from him (R. 61), each of whom was charged from \$100 to \$250 per month for the service (R. 103).¹ During the time his predecessor Coan ran the service, petitioner had been the manager and treasurer (R. 63, 64). No bookkeeping records were kept (R. 61). Coan died in 1945 (R. 62, 65). Regarding the source of the funds invested in the Falmouth Bowling Club, petitioner said it was from moneys accumulated from the news service. The witness added, "And I think I brought up the point were these amounts that he had reported on his tax return, and his answer was that some of the amounts were not reported" (R. 62).

The second of the two interviews was on July 17, 1951 at the same location, but by different agents, Cortese and Toohey (R. 127). Since the time of the prior interview with McMahon, the petitioner's accountant had delivered to McMahon the net worth statement signed by the petitioner (Govt. Ex. 20, R. 42, 66, 123, 231-234) and the questioning related chiefly to the real estate values and bank accounts listed in the statement (R. 130, 131). The testimony on this subject was given by agent Toohey. It was elicited by the prosecuting attorney by questions phrased in terms of the masculine singular pronoun "he", but the agent's testimony was usually in the passive voice and gave no indication whether the expenditure was made by the peti-

¹ Gross income from the news service reported on the tax returns was as follows:

1946	\$22,100.	(Exh. 1, R. 26, 220)
1947	25,350	(Exh. 2, R. 26, 222)
1948	29,640	(Exh. 3, R. 26, 226)

titioner or his wife or jointly by both of them (R. 131-137).²

The net worth statement signed by the petitioner (Govt. Ex. 20, R. 42, 66, 123, 231-234) was one of five pages bound together and enclosed in covers, the front cover and each page reading "DANIEL AND EVA SMITH".³ The circumstances of its preparation and delivery to agent McMahon were the subject of considerable testimony. It was delivered to McMahon by witness Delaney, an accountant representing the petitioner, on June 13, 1951 (R. 93, 190). McMahon had been assigned to investigate Daniel and Eva Smith on October 13, 1950 (R. 58). He had his first conference with Delaney with reference to the case on December 13, 1950 (R. 72). During the next six months, McMahon conferred with Delaney seven times (January 16, R. 73; March 28, R. 74; April 2, R. 75, 87; April 11, R. 75; April 30, R. 60, 69; May 24, R. 76; and June 11, R. 90, 91) and spoke with him on the telephone on six occasions (January 15, R. 73; March 20, R. 74; March 26, R. 87; May 16, R. 76; May 23, R. 73 and June 11, R. 91, 189). There may have

² For example, agent Toohey's complete testimony pertaining to real estate on St. James Street was as follows (R. 132):

Q. Did you inquire about any other real estate? A. 16 St. James Street.

Q. And what did you ask him about that property? A. The type of property, number of rooms, furniture.

Q. Did you ask him what he paid for it? A. I did.

Q. What did he tell you with reference to the questions that you asked him? A. He stated that there were seven rooms, new furniture, single house, cost \$9,600, paid \$1,000, which was returned to cover the repairs to be made but never paid out; bought from Lucy, mortgage was to Co-Operative Bank, about \$8,000; actual equity about \$1,000 cash; no mortgage on it now; does not know when paid; bought direct from owner.

Q. Did you ask him anything else about that property? A. Not that property.

³ The covers and the first of the five pages, a table of contents, do not appear in the printed record, although the entire exhibit was designated (R. 253); by stipulation of counsel, the original exhibit in its entirety was transmitted to the Court of Appeals (R. 255).

been other conferences or phone conversations with Delaney which McMahon did not note in his diary (R. 68, 92).

Early in the course of the negotiations between McMahon and Delaney, at least prior to March 20 (R. 74), McMahon asked Delaney to prepare the net worth statement (R. 199, 200). On March 26, the figures were ready except for some adjustment of stock transactions (R. 87). On April 2, the petitioner came to Delaney's office to go over the figures (R. 87). On April 11, Delaney advised McMahon that the figures were ready and that they included no cash at the beginning (R. 75). On that date, they also made the appointment for the interview on April 30 when the petitioner made the admission about which McMahon testified.

About three weeks after the interview, on May 24, Delaney took his work papers in to McMahon's office and showed them to him (R. 77, 78, 188). Since the papers presented to McMahon at that time contained no totals of the taxes and penalties computed thereon for each year by Delaney on the basis of the net worth figures, McMahon himself added the figures on an adding machine and arrived at totals of approximately \$18,000 tax and \$9,000 fraud penalty, for a combined total of approximately \$28,000. (R. 85, 86). McMahon knew that a fraud penalty was included in the liability as computed by Delaney (R. 83, 86), who said he would have the statement in final form and signed by May 29 (R. 86).

Following this conference, McMahon spoke to special agent James Sullivan, a supervisor to whom McMahon had reported at least twice previously during his handling of the case (R. 74, 75), and noted in his diary under May 24 "No 870's." A form 870 is an agreement to the assessment of the tax (R. 181). It is executed at the end of an investigation if the taxpayer agrees with the figure (R. 76). McMahon never discussed the subject of a form 870 with Delaney (R. 187).

Delaney did not return until the morning of June 11, when he had the statement with him, typewritten and bound but not executed (R. 188, 197, 89). McMahon asked Delaney if the petitioner would sign the statement and Delaney replied that he did not know but that he had an office appointment with Mr. Smith at one o'clock and that he would ask him then (R. 188). While conferring with Mr. Smith, Delaney received a phone call from McMahon asking if Smith would be willing to submit a check with the net worth statement (R. 189). Delaney could remember no specific amount mentioned (R. 189), only that it was to be approximately the amount of the tax (R. 189), but McMahon testified on the basis of a memorandum made by him (R. 89) that Delaney told him he would get a check for \$15,000 and would deliver it with the statement (R. 90-92). Two days later, Delaney delivered to McMahon the statement, signed and notarized (R. 66, 93), together with a treasurer's check of the Guaranty Bank & Trust Company dated June 12, 1951 payable to the Collector of Internal Revenue in the amount of \$15,000 (R. 67, 93).

On the following day, June 14, after conferring with his group chief and other Treasury Department personnel, McMahon mailed the check back to Delaney and kept the net worth statement (R. 94). McMahon's covering letter, (Def. Ex. A; R. 94, 235), stated in part, "As you already know, where possible prosecution may be recommended, no payment of taxes is accepted until that feature of the investigation is decided."

On June 15, after receiving the letter, Delaney phoned McMahon asking him what the story was, and McMahon stated that he was sorry and that the case was now out of his hands (R. 95, 191, 202). He referred Delaney to another special agent (R. 191), as he did in his letter of the 14th. Up to the day when the statement and check were delivered, June 13, the case was assigned to McMahon alone (R. 95).

After the case had been transferred to other agents, at a conference on July 17, McMahon told Delaney that he was sorry that Delaney got the impression of a voluntary disclosure (R. 95-96).

Delaney had himself been a special agent of the Treasury for a period of about four years (R. 185-186). He and McMahon had worked in the same office; they knew each other previous to the Smith investigation (R. 59). He was familiar with the method in which net worth cases were handled in the Department from an investigative standpoint (R. 198). But he had never handled a net worth case while employed by the Government (R. 198) and it was at McMahon's solicitation that he prepared and submitted the statement signed by the petitioner (R. 199, 200). He believed that acceptance of a check constituted closing of the case (R. 203), at least as far as possible criminal prosecution was concerned (R. 235). He expected that acceptance of a check by McMahon would end this case (R. 203). At a "heated" conference on July 17, when tempers were high (R. 204), Delaney stated that there had been an understanding that the case would be closed if a check were submitted (R. 128), that if he had any doubt about the case being closed on the basis of the net worth statement he would not have had Mr. Smith sign it (R. 95-96), and that he was of the opinion that the case was closed (R. 191).

On the basis of the figures in the net worth statement, the Smiths owed the United States approximately \$28,000 in taxes and penalties over and above the taxes paid by them for the years 1946 to 1949, inclusive (R. 201). But Delaney was not satisfied that this amount was actually owing; figures missing from the statement would decrease the amount of the tax liability (R. 201). There was always talk of cash between him and McMahon (R. 194, 75). Mr. Smith felt that cash on hand should have been included (R. 195).

The folder containing the statement signed by the petitioner was marked for identification (R. 42) and tentatively excluded once (R. 66) before being admitted against the petitioner only and over his objections prior to the testimony of the final Government witness, agent Toohey (R. 123-124).⁴ One of the petitioner's objections to its admissibility was that it was a confession and the judge should have a *voir dire* before admitting it. The judge overruled the objection on the ground that the statement was not a confession. This ruling had been made at one of the off-the-record bench or lobby conferences and was not made as such on the record. However, the prosecuting attorney referred to the ruling and stated it unequivocally (R. 125).

The folder containing the net worth statement signed by the petitioner was utilized by the prosecution during agent Toohey's testimony in two ways: (a) first, the agent derived some of the figures in the Government's computation from the folder (R. 183); the automobile figures came from it (R. 163) and the living expense figures used in computing the alleged tax liability came from a page of it other than the one containing the net worth statement (R. 157, 233);⁵ (b) second, the prosecutor had the agent contrast certain figures in the Government computation on the blackboard with corresponding figures in Exhibit 20 (R. 153-156). The

⁴ At the time of its admission, the trial judge stated to the jury "that a written statement such as that which is obtained either as a result of promise of immunity or gain or one induced by fear or by threat in the Federal courts is not admissible as evidence * * * but I think that you can gather from the evidence and the cross-examination that has gone on up to now and probably from some future evidence that counsel will argue that Smith was induced to give this statement by reason of deceit or fraud." (R. 123)

⁵ In this connection, the prosecutor had stated immediately prior to the agent's testimony, "I want to use that with my revenue agent, because he is going to take certain facts out of that in determining real estate values and other factors." (R. 125-126).

prosecutor started a figure-by-figure comparison by having the agent read the "cash in banks" figures in Exhibit 20 while he pointed to corresponding figures on the blackboard, but, at the suggestion of the judge, thereafter contrasted only the totals for each year.

On two occasions between admission in evidence of Exhibit 20 and the charge to the jury, the trial judge commented upon it in relation to the law applicable to the case as a whole. The first came during the prosecutor's reply to defense counsel's extended statement (R. 138-146) of the grounds for defense objections (R. 150) to a joint computation of alleged net worth increases. The judge stated that the prosecution was trying to prove too much by the net worth statement signed by the petitioner and still had stumbling blocks ahead, possibly with respect to both defendants (R. 149). Second, in directing a not guilty verdict in the case against Eva, the judge stated that in the case of Eva, no base to start from had been established (R. 184).

The defense offered the testimony of two accountants: Delaney, who testified concerning the preparation and delivery of Exhibit 20 (R. 185-205) and Rowe, whose testimony pertained entirely to the year 1950 and therefore does not appear in the record. The main defense, however, was not testimonial but rather legal. As explained at length in the absence of the jury, defense counsel believed that failure to allocate the assets and expenditures between the co-defendants and computing their tax liability on a joint basis were fatal errors (R. 138-146).

The petitioner filed a motion for judgment of acquittal on each of the five counts alleged in the indictment at the conclusion of the Government's evidence (R. 15); he renewed this motion at the close of all the evidence;⁶ a hearing

⁶ The petitioner's renewal of his motion for judgment of acquittal (R. 15) was designated for inclusion in the record (R. 252) but not

on the motion was held in the absence of the jury and the matter was taken under advisement (R. 3); the motion was allowed as to the fifth count and denied as to the first four counts (R. 16, 206, 207). Following the hearing on the motion for judgment for acquittal, but after the trial judge left the bench, the petitioner filed with the clerk, who had not left the courtroom, his requests for instructions (R. 3, 16, 206).

Before the arguments and charge, counsel for the petitioner requested that the blackboard on which agent Toohey had written his computation be removed from the view of the jury (R. 206) and objected to the court's denial of this request (R. 207). Three blackboards were used by the prosecution during the trial: (a) the first contained the balances in the various bank accounts and the war bonds purchased; it was filled out by the prosecuting attorney as each bank witness testified (R. 218); (b) a second contained the cost figures of most of the assets acquired by the defendants; it was filled out by the prosecuting attorney as the particular witness testified (R. 44, 413, 118, 119); (c) a third contained a joint computation by the revenue agent of totals of assets and liabilities, resulting in figures labeled "Increase in Net Worth" (R. 217); it was placed before the jury over the defendants' objections (R. 150); the computation on this blackboard, sometimes called the

printed as such. The typewritten transcript of the testimony contains the renewal at pp. 342-343, as follows:

Mr. Garrity: That's all. Thank you.

The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Miller: I think not, your Honor.

Mr. Garrity: I would like to renew my motion for acquittal filed with your Honor.

The Court: I will discharge the Jury until ten o'clock tomorrow morning. You may go now.

(The Jury leaves the Courtroom at 3:45 P.M.)

The Court: I will hear you now.

agent's net worth statement or computation (R. 150, 172, 174), was referred to many times during the agent's testimony (R. 152, 153, 154, 162). None of the blackboards contained the figures used in the net worth statement signed by the petitioner.

The charge to the jury put the question of how the net worth statement signed by the petitioner was obtained from him (R. 210). As framed by the judge, the question was not as to the understanding of the petitioner's accountant Delaney, but rather whether or not trickery, fraud or deceit was practised upon Delaney to obtain the statement. If the jury should decide that question in the affirmative, it was instructed to reject all the evidence contained in the statement and all evidence obtained through it (R. 210); if the negative, to use everything in the statement and every bit of evidence in the case (R. 210, 212). Before the jury retired, the scope of this instruction was narrowed to include only evidence admitted against the petitioner (R. 214).

The jury returned verdicts of guilty on each of the four counts submitted to it (R. 215) and the judge imposed consecutive sentences of imprisonment for one year and one day on each count, and also a fine of \$5,000.00 (R. 25). The petitioner was admitted to bail pending appeal (R. 4).

The Court of Appeals for the First Circuit affirmed the judgment of the district court (R. 264). Its opinion analyzed the sufficiency of the evidence entirely on the basis of the net worth statement signed by the petitioner (Govt. Ex. 20, R. 42, 66, 123, 231-234) and without reference to the blackboard figures upon which witness Toohey, the revenue agent, computed the tax liability of the petitioner and his wife. The opinion treated Exhibit 20 as a statement of the petitioner's individual net worth and in that connection cited the wording of the jurat appearing at the foot of the said statement. It approved the admission in

evidence of Exhibit 20 for the reason that the record disclosed no evidence of coercion or compulsion of the petitioner (R. 260). It found no error in the judge's charge to the jury.

The petitioner filed a petition for rehearing (R. 265) which the Court of Appeals denied (R. 267). An order staying mandate was entered (R. 267). On June 7, 1954, this Court granted the petition herein for a writ of certiorari and ordered that the record which accompanied the petition be treated as though filed in response to such writ (R. 268).

SUMMARY OF ARGUMENT

The argument of the petitioner before this Court will be divided into four parts, as follows:

1. Corroboration of starting net worth.
2. Admissibility of the statement signed by the petitioner.
3. Failure of the Court of Appeals to consider whether the evidence other than the statement was independently sufficient to sustain the conviction.
4. The variance in the theory on which the case was tried in the district court from the theory on which the conviction was sustained in the Court of Appeals.

The arguments on the first two points will go back to the proceedings in the district court in some detail and endeavor to convince this Court that errors which originated there were perpetuated by the Court of Appeals. Reversal on these points would make appropriate an acquittal of the petitioner or a remand for a new trial. The arguments on points three and four pertain solely to the opinion of the Court of Appeals and ask this Court only to remand to that court for consideration of the arguments of the petitioner as to the sufficiency of the evidence to sustain the conviction. The petitioner does not at this time ask this

Court to search the record in order itself to answer this question and will indicate the arguments he wishes to be considered in the Court of Appeals only to the extent necessary to give the Court a basis for decision on the points raised herein.

The main defense of the petitioner at the trial and before the Court of Appeals was negative, in the nature of a demurrer to the evidence, and little attempt was made to disprove any of the evidence introduced by the Government. This position was based on the belief that the Government could not secure a conviction against the petitioner on the basis of evidence relating to another person. In a memorandum on petitioner's request for a bill of particulars, the Government early stated that the amount of alleged unreported income of each co-defendant was immaterial to the issues (R. 12-13), and at the hearing Government counsel stated that he had no evidence or proof sufficient to segregate the items of income (R. 13). No effort was made at the trial to convince the jury that assets admittedly in the name of Eva Smith were beneficially owned by the petitioner, and it was not until its brief before the Court of Appeals that the Government for the first time advanced an argument of such ownership based on the words "my true worth" on the net worth statement signed by the petitioner. Petitioner contended in the Court of Appeals not only that this approach was fundamentally unsound and was therefore a basis for reversal, but also that many other errors of a substantial nature flowed directly from it. These contentions were intentionally omitted from the petition for certiorari and will not be further developed before this Court. *Bates v. United States*, 323 U.S. 15 (1944); *Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 453-454 (1935).

1. The Court of Appeals for the Ninth Circuit in *Calderon v. United States*, 207 F2d 377 (1953) reversed a con-

viction in a net worth tax evasion case because the admissions of the defendant of his net worth at the start of the indictment period were insufficiently corroborated by independent evidence. The *Calderon* case has been brought before this Court and will have been argued before this case; this brief will not, therefore, discuss the law on this point, but will be confined to indicating that the *Calderon* law as to corroboration is applicable to the facts of this case.

The opinion below points to three items of evidence in corroboration of petitioner's starting net worth (R. 262). One, that petitioner's wife was a housewife, is just not corroborative of the point. Another, that petitioner had earned \$40.00 a week between 1941 and 1945, is itself an oral admission to a treasury agent. The third is tax returns for prior years; this evidence is extremely weak; the record does not even indicate whose returns were being talked about, and does not state the amount of income reported on the returns (R. 26-27).

Petitioner was not credited with any cash on hand either in the statement signed by him or in the Government computation. There was never any corroboration as to that specific item.

2. The Government introduced at the trial a financial statement signed by the petitioner (Gov't. Ex. 20; R. 42, 66, 123, 231-234). This statement disclosed increases in worth greater than the amount of income reported on the petitioner's tax returns and was the basis of the opinion of the Court of Appeals affirming the petitioner's conviction (R. 260-261).

The statement was delivered by the petitioner's accountant to a treasury agent along with a check for \$15,000.00 in part payment of a liability for taxes and penalties computed on the basis of the statement. This was the culmination of many discussions between the accountant and the

agent, and the accountant understood that it would terminate the criminal aspect of the case, especially since the agent knew that a check would accompany the statement. The check was accepted by the agent but was returned by him on the next day, enclosed with a letter (Def. Ex. A; R. 94, 235) stating that, as the accountant knew, checks could not be accepted where there was a possibility of criminal prosecution.

The petitioner moved to suppress this statement prior to trial on the ground that it had been obtained by fraud and trickery on the part of the Government; he renewed this argument at the trial as a reason for excluding the statement from evidence and, in addition, contended that the statement was inadmissible as a confession induced by a promise of immunity.

The trial judge refused to hold a preliminary examination in the absence of the jury on its admissibility and failed to instruct the jury on the admissibility of a confession induced by a promise. The Court of Appeals stated that the statement was properly admitted, since there was no evidence of "coercion or compulsion" (R. 260).

The rules applicable to the admissibility of confessions should be applied to this statement, because, as the opinion of the Court of Appeals makes clear, it provides in itself almost an entire case against the petitioner. If not completely a confession, it is so damaging an admission as to be entitled to the gravest consideration, cf. *Ashcraft v. Tennessee*, 327 U.S. 274, 278 (1946).

Treated as a confession it should be excluded because of its untrustworthiness. It was admittedly false, both to the benefit and to the detriment of the petitioner. Reliance on the conduct of the treasury agent as an implied promise was reasonable, and the inducement, cessation of criminal prosecution was material.

If it is not sufficiently clear that the statement should

have been excluded, there should have at least been a preliminary hearing in the absence of the jury on the question. *United States v. Carignan*, 342 U.S. 36, 38 (1951). The petitioner seasonably demanded such a hearing, but it was denied by the judge on the ground that the statement was not a confession (R. 124-126). It was clearly not treated as a mere admission by the Court of Appeals, however, in its discussion of its admissibility, and it is submitted that the court's failure to state that a hearing should have been held was in error.

3. In *Stein v. New York*, 346 U.S. 156, 179 (1953) the Court indicated that it looked with some disfavor upon a procedure similar to that utilized in the district court below in admitting the statement signed by the petitioner into evidence and then instructing the jury to reject it if fraud or deceit were found. It was pointed out that such a procedure made necessary consideration of two alternatives, one if the jury accepted the evidence and the other if it rejected. The Court then did in the *Stein* case review the two alternatives.

The Court of Appeals in the case now before the Court approved the procedure of the district judge in submitting the statement to the jury (R. 260). It did not then consider whether or not the evidence in the case was sufficient to sustain the conviction if the jury rejected the statement; it assumed only one of the two alternatives. The case must, therefore, be remanded to the Court of Appeals for its further consideration.

4. There is much in the record to show that the case was tried to the jury on the theory that the increase in assets of the petitioner and his wife, as brought out in the testimony relating to bank accounts, real estate, mink coats, stock, automobiles, etc., and as written on the blackboard before the jury, was sufficient to show that the petitioner earned income in excess of that which he reported. The con-

trust in emphasis given to the blackboard and to the statement signed by the petitioner is in itself striking. From the Government's statement in the bill of particulars that they relied "upon circumstances of increased net worth" (R. 9) to the judge's charge to the jury that the Government had set out to show "through circumstantial evidence that this crime or these crimes had been committed" (R. 211), there was never an indication that the statement of the petitioner, together with corroborating evidence, was sufficient to convict him. Certainly this was never pointed out to the jury. Indeed, the Government contended and the judge ruled that it was only an admission (R. 125-126).

Had the petitioner any inkling of the basis upon which the Court of Appeals would decide the case, the matters of objections to evidence, evidence to be offered, arguments to be made, and requests for instructions would have been influenced by different considerations. Factual issues should be formulated and determined in the trial forum and litigants should not be surprised in appellate courts by decisions on issues upon which they have offered no evidence. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). A verdict on the theory adopted by the Court of Appeals requires submission to the jury of the fact issues peculiar to that theory. *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949).

The petitioner was not convicted by the jury on the basis of the statement signed by him and other admissions; if anyone can ever be certain about what goes on in the minds of twelve people, he was convicted in the minds of the jury by the circumstantial evidence recorded on the blackboards before their very eyes. The petitioner is entitled to a review of the evidence on which he was convicted and against which he defended, not to a review of evidence which *might*, had the case been tried differently, have been sufficient for the conviction.

ARGUMENT

I. THE STARTING NET WORTH WAS NOT SUFFICIENTLY CORROBORATED BY INDEPENDENT EVIDENCE.

In *Calderon v. United States*, 207 F.2d 377 (9 Cir. 1953) a conviction for income tax evasion on the net worth theory was reversed by the Court of Appeals because of a lack of independent corroboration of the defendant's starting net worth as stated in his written and verbal admissions. The *Calderon* case was relied upon by the petitioner in his brief before the Court of Appeals and was cited by the Court in its opinion (R. 261). However, its opinion did not interpret that decision to require specific corroboration of the element of cash on hand in the starting position, or even of the starting position as a whole, but rather looked for and recited general corroboration of petitioner's oral and written admissions.

Because the *Calderon* case is before this Court and will have been argued prior to the oral argument of this case, this brief will not discuss the law on the point, but will only call the Court's attention to certain facts and point out the applicability of that decision to such facts. If, then, this Court approves the law set forth in the opinion of the Court of Appeals for the Ninth Circuit, it is submitted that the opinion below in the case at bar is in error.

Six numbered points are set out in the opinion of the Court of Appeals as corroborating evidence of the written and verbal statements of the petitioner (R. 262-263). Of these, only the second point is related by the opinion to corroboration of the net worth of the petitioner on December 31, 1945, the starting position (R. 262). The evidence cited in that point consists of testimony regarding previous tax returns, an oral admission by the petitioner about his

salary between 1941 and 1945, and testimony that his wife was a housewife from 1943 to 1950.

The brother of petitioner's wife, witness George, testified that she was a housewife from 1943 to 1950, and that she had no other occupation during that period except that she owned a building which the witness handled for her (R. 51). This evidence does not corroborate petitioner's statements as to his starting net worth in any particular.

Witness McMahon, a treasury agent, testified that at a conference late in April of 1951 (R. 60), petitioner stated to him that he had worked in a package store for about \$40.00 weekly from 1941 to 1945 (R. 63). This, being itself an oral admission, cannot be corroboration of such admissions.

Finally, a witness from the office of the Director of Internal Revenue identified the joint tax returns of Daniel and Eva Smith for the years 1946 through 1950, and a photostat of the 1945 joint return (R. 26). (Returns for the years 1946 to 1949 are Govt. Exs. 1 to 4, R. 225-230). Following that portion of his testimony, he testified that no returns for the years 1936 through 1939 could be found; that non-taxable returns were filed for the years 1940 and 1942, a non-assessable return for 1943, a refundable return for 1944, and a taxable return for 1941 (R. 26-27). The record does not disclose the amount of income reported on any of these returns nor, except for the non-taxable returns, the amount of tax paid in any year. The record before this Court and before the Court of Appeals also does not disclose whether the returns were joint or the individual returns of either Daniel Smith or Eva Smith, the co-defendant.⁷ Since so little information is disclosed by this tax return testimony, it seems entirely inadequate to support

⁷ Reference to Page 25 of the transcript of testimony, from which the record was designated, discloses the following testimony immedi-

the starting net worth position. This is true especially as it is the only evidence tending so to corroborate.

In two respects, moreover, the position of the petitioner is stronger than that of the defendant in *Calderon*. First, no cash on hand was credited to petitioner either in the statement signed by him nor in the Government's computation (R. 151, 217), although petitioner had mentioned to a treasury agent receipt of cash payments in previous years (R. 102). Second, in the statement signed by the petitioner (R. 231) a total increase in net worth of \$11,213.48 is computed for the year 1946. However, of this increase, \$9,600.00 is represented by the supposed acquisition of the residence at 16 St. James Road, Shrewsbury. In fact this property was acquired in 1943 (Def. Ex. P; R. 178, 244) and was properly included in the government's computation of net worth as of December 31, 1945 (R. 217). If this mistaken \$9,600.00 increase is eliminated from the net worth statement signed by the petitioner, the total admitted increase in net worth for 1946 is \$1613.48. The petitioner paid a tax for the year 1946 on a net income of \$3,777.66. Therefore, it can be said that the government's evidence, far from corroborating petitioner's written statement, disproved his admission of tax evasion for the year 1946, the charge alleged in the first count of the indictment.

ately preceding the quoted portion of the witness' testimony in the record.

Q. Now, Mr. Witness, was a search made for the tax returns of the defendant, Daniel L. Smith, for the years prior to 1946, at your office? A. Yes.

Q. Just Yes or No. A. Yes.

Q. Yes.

The witness was never asked, and never testified, concerning any of the tax returns of Eva Smith prior to 1945. In view of the fact that it later turned out that Eva owned most of the assets, it is felt that this omission from the designated record is harmful, if anything, to the petitioner. In any event only the official record was before the Court of Appeals.

II. THE FINANCIAL STATEMENT SIGNED BY THE PETITIONER WAS IMPROPERLY ADMITTED INTO EVIDENCE.

The facts leading up to and surrounding the submission of the financial statement submitted by petitioner's accountant to the treasury agent have already been stated in detail. To summarize briefly at this point, the accountant and the treasury agent both knew that a check in part payment of the liability computed on the basis of the statement would accompany it and that such a check would not be accepted if the possibility of criminal prosecution remained open; the check was accepted by the treasury agent and returned the next day.

The net worth statement signed by the petitioner was admitted in evidence in the trial court without a preliminary hearing before the judge in the absence of the jury, in spite of petitioner's request therefor, on the ground that it was not a confession but merely an admission. (R. 123-126). Also, the judge charged the jury that the statement should be rejected only if fraud or deceit had been practiced on petitioner or his accountant, and that their state of mind when submitting the statement was immaterial. (R. 210). The jury was instructed primarily on circumstantial evidence and the case was submitted to it on that basis. (R. 209, 211). The Court of Appeals affirmed the conviction without any discussion of a confession induced by a promise. It mentioned only coercion or compulsion (R. 260), objections never raised by the petitioner at any time.

There was error in the District Court both in the manner and the fact of the admission in evidence of the statement, error compounded in Court of Appeals by its omission in the opinion to consider the law relating to the admission in evidence of a confession induced by a promise.

The error in the trial judge's treatment of the statement

was apparently predicated upon his acceptance of the Government's contention that the statement was an admission and not a confession (R. 125-126). This could not, however, have been the rationale of the Court of Appeals, as the two cases cited in the part of the opinion discussing the admissibility of the statement, *Wilson v. United States*, 162 U.S. 613 (1896) and *Williams v. United States*, 189 F2d 693 (1951), deal unmistakably with the law of confessions. Further, all the elements of the crime charged were deemed by the Court of Appeals to have been contained in the statement, which was considered to have been sufficiently corroborated.

In any event, this Court has made no distinction between admissions and confessions in this regard. In *Bram v. United States*, 168 U.S. 532 (1897), *Wilson v. United States*, 162 U.S. 613 (1896), and *Lisbena v. California*, 314 U.S. 219 (1941) the statements of the defendants were all accompanied by express denials of guilt. In *Ashcraft v. Tennessee*, 327 U.S. 274, 278 (1946) this Court expressly stated that the limitations imposed on the states by the Fourteenth Amendment apply to admissions as well as confessions. Professor Wigmore characterizes a confession as one form of admission and would limit the law on admissibility of confessions to those admissions "which directly touch the fact of guilt." III Wigmore on Evidence (3rd ed., 1940) § 821 (3). Whether regarded as a confession or as an admission, the statement was a document of an incriminating nature and was submitted under circumstances showing clearly that it was designed as a vehicle to secure criminal immunity and a civil settlement. It should, therefore, be considered as a confession in any discussion of its admissibility.⁸

⁸ The Government contended in its Brief in Opposition to the Petition for Certiorari, as it had in the Court of Appeals, that the statement was exculpatory and, therefore, not a confession (Brief in

As far as can be determined, this Court has not decided any case in which a defendant has contended that a confession was inadmissible because obtained by a promise of immunity. However, dicta in several cases recognize the traditional rule, e.g. *Sparf and Hansen v. United States*, 156 U.S. 51, 55 (1895) ("hope of reward"); *Wilson v. United States*, 162 U.S. 613, 622 (1896) ("any threat, promise, or encouragement of any hope or fear"); *Bram v. United States*, 168 U.S. 532, 542-543 (1897) ("any direct or implied promises"); *Wan v. United States*, 266 U.S. 1, 14 (1924) ("induced by a promise or a threat").

Admissibility in the Federal Courts is governed by "principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience". Fed. Rules Crim. Proc., 26. The common law definitely recognizes the inadmissibility of confessions induced by such promises. III Wigmore on Evidence (3rd., ed., 1940) § 836 (1).

In the light of the fact that the petitioner had never suggested any coercion or compulsion in the procurement of the statement, and in view of the contentions that were made, it is surprising to find the Court of Appeals discussing the admissibility of the statement in the following language:

"The appellant contends that the district court erred in admitting this statement and in failing to submit to the jury the question of the voluntariness of the state-

Opposition 12-13). This contention relies on the facts that the tax plus fraud penalty had been computed to be some \$28,000, and the check submitted with the statement was for \$15,000. This, however, overlooks the fact that the check was intended and understood to be only a part payment, a fact clearly stated in the letter returning the check (Def. Ex. A; R. 94, 235). Also, as pointed out to the Court of Appeals, the nature of the civil fraud penalized by L. R. C. § 293 (b), 26 U. S. C. § 293 (b), is identical to that proscribed by section 145 (b).

ment. We find no merit in these contentions. There is no evidence that the appellant was in any way coerced or compelled to submit the statement. The statement, therefore, was properly admitted in evidence. *Wilson v. United States*, 162 U.S. 613 (1896). And since there was a complete absence of evidence of coercion or compulsion, no factual question on this issue was presented for the jury to determine. *Williams v. United States*, 189 F.2d 693 (1951)." (R. 260)

The Court of Appeals here states and apparently applies good law to facts which do not exist; it totally ignores the law which is applicable.⁹

The principle of the exclusion of a confession induced by fear or promise is the untrustworthiness of the testimony contained therein. III Wigmore on Evidence (3rd ed., 1940) § 822; *Lisbena v. California*, 314 U.S. 219, 236 (1941). The statement signed by the petitioner was concededly untrustworthy; not only does it not disclose a bank account owned by the petitioner, it also contains errors to his detriment. For example, the residence at 16 St. James Road, Shrewsbury, listed in Exhibit 20 as having been acquired in 1946 at a value of \$9600.00, was shown at the trial to have been acquired in 1943 (Def. Ex. P; R. 178, 244), and was included in the Government's figures at the start of the prosecution period (R. 217). Moreover, the circumstances surrounding the delivery of the statement and the check show that the petitioner and his accountant believed that a very real threat of criminal prosecution could be avoided by a substantial payment. Also the possibility of criminal prosecution for tax evasion, even to an innocent

⁹ There are, of course, different bases for the exclusion of confessions. See, e.g., *McNabb v. United States* 318 U.S. 332 (1943); *Lisbena v. California*, 314 U.S. 219, 236 (1941). Petitioner, however, relies only upon the common law.

man, with the likelihood of an expensive and time-consuming trial and the inevitable notoriety, is something to be avoided at almost any cost.

It is submitted that the financial statement signed by the petitioner should have been excluded by the trial court, and that this Court should remand with directions that it should be excluded. Even more fundamental and apparent, however, is the error in failing to grant the petitioner a preliminary hearing in the absence of the jury at which he could, if he desired, himself testify.

The trial judge admitted the statement into evidence at the end of the second day of trial (R. 123-124). At his first opportunity, on the morning of the third day, counsel for the petitioner on the record requested the judge to hold a preliminary hearing in the absence of the jury on the admissibility of the statement (R. 124-125). Remarks of counsel both for the petitioner and for the Government at that time indicate that prior conversations had been held with the judge and that he had ruled that it was not a confession (R. 125). Although nothing was said about the petitioner himself testifying, the emphasis being put on Delaney, the petitioner's accountant, concomitant with the right to such a hearing in the federal courts is the right of the defendant to testify. *United States v. Carignan*, 342 U.S. 36, 38 (1951). In this case, since the judge refused even to hear the accountant before ruling finally on the admissibility of the statement, it does not appear whether counsel contemplated the testimony of the petitioner himself. Indeed it is quite possible that such a decision had not been made at that time and that the development of the evidence would make the final decision.

The law in this area is not new; there are no novel questions involved; and it is only surprising that the Court of Appeals gave the contentions of the petitioner so little consideration in its opinion. Basically, the problem con-

cerns the nature of the statement and the nature of the inducement--if, as the petitioner contends, the statement directly touches the fact of the petitioner's guilt and if he and his accountant had reasonable ground to feel that the petitioner was obtaining criminal immunity from tax evasion prosecution, then he is entitled in the federal courts at least to a preliminary hearing on admissibility at which he may, if in his best judgment he feels he should, testify in his own behalf in the absence of the jury. If, on such a preliminary hearing, he is able to satisfy a trial judge of the facts indicated herein, to establish that he submitted his net worth statement disclosing increases greater than accounted for by his reported income because he justifiably believed that he was thereby assuring that the criminal prosecution would be dropped, then he is entitled to have the statement excluded from evidence at the trial.

III. THE PETITIONER IS ENTITLED TO A REVIEW OF THE OTHER EVIDENCE IN THE CASE.

The case was tried and submitted to the jury as one based on circumstantial evidence. As the judge said in his charge, "The Government has set out to show you through circumstantial evidence that this crime or these crimes have been committed." (R. 211) The bulk of the evidence introduced by the Government related to asset acquisition and expenditures, and very little pertained to the contents of the financial statement signed by the petitioner.

In the charge the judge instructed the jury that it should reject the statement and all evidence obtained through it, if it had been obtained through the practice of fraud, trickery or deceit upon the petitioner or his accountant. In the light of this instruction, the jury may well have rejected the statement and convicted.

In the Court of Appeals, however, the net worth state-

ment signed by the petitioner advanced to the center of the stage and almost singlehandedly carried the opinion to the affirmance of the conviction. The opinion recounts that much evidence of assets was introduced at the trial (R. 258). But in that part of the opinion which really affirms the conviction (R. 261-263), the only asset mentioned is the petitioner's bank account in the Mechanics National Bank (R. 62). The Court of Appeals did not review the circumstantial evidence to determine its adequacy to sustain the conviction.

Parenthetically, the jury could have not determined that any substantial evidence was obtained through the net worth statement signed by the petitioner. All of the evidence of assets and expenditures in the case, with one or two minor exceptions,¹⁰ came from testimony of witnesses.

The circumstances of the admission of the net worth statement and its conditional submission to the jury raises the procedural point which was decided by this Court in *Stein v. New York*, 346 U.S. 156 (1953). That point is the necessity of consideration by an appellate court of the alternative hypotheses of acceptance or rejection by the jury of the evidence conditionally admitted. It arose in the *Stein* case because under New York law the decision as to the admissibility of a confession is initially for the judge; if he decides that it is admissible, he must submit the same question of admissibility to the jury under proper instructions. The defendants had confessed and the issue of the admissibility of their confessions was decided first by the judge and then referred to the jury for its decision. The jury returned verdicts of guilty.

¹⁰ In his summation testimony, Revenue Agent Toohey used the living expense figures found in Exhibit 20 (R. 157, 233). Toohey testified that he got furniture and automobile figures from the statement (R. 162-163). However, the automobile figures differed from that given by a witness (R. 107), and he later testified that the furniture figure came from an oral admission of the taxpayer (R. 169-170).

Among the contentions of the petitioners in the *Stein* case were first, that the confessions had been coerced from them in violation of their constitutional rights; and second, that the jury should have been instructed that the defendants must be acquitted if the confessions were found by the jury to have been coerced. It appears not to have been disputed that there was sufficient evidence entirely apart from the confessions on which the verdicts could be sustained. The Court could have decided the case merely by ruling that the jury could have found on the evidence that the confessions had not been coerced and were sufficiently corroborated to furnish sound bases for convictions. And it did so rule. However, upon examination of the procedural situation, the Court determined that it must not only rule on the issue of coercion on the hypothesis that the jury accepted the confessions, but that it must also rule on the issue raised by the hypothesis that the jury rejected the confessions.

This latter issue was raised by a request that the jury be instructed to acquit if it found the confessions to have been coerced. If there had been insufficient other evidence to sustain the convictions, this instruction would obviously have been proper. The Court, however, seems to have assumed that the request was based on the fact that there was sufficient evidence apart from the confessions and that it was designed to raise the constitutional point suggested by dicta in *Malinski v. New York*, 324 U.S. 401 (1945) and other cases.

The importance of the *Stein* decision to this case does not turn on the fact that the alternative issue was raised by a request for an instruction; it is based upon the fact that, although the Court considered it improbable, it felt forced to recognize that the jury might have rejected the confessions and convicted on the other ample evidence. In the case at bar, also, the jury may have rejected the

confession and convicted on the other evidence; indeed, considering the evidence at the trial, it is extremely probable that they did convict on the other evidence.

The opinion in the *Stein* case discusses the difficult problems which are raised by the procedure used in New York and by the district court below and suggests not only the Court's disapproval of the practice but also that the federal rule is otherwise. *Stein v. New York*, 346 U.S. at 179. But see III Wigmore on Evidence, 1953 Pocket Supplement § 861, fn. 3. As long as the procedure is used, the problems will arise and it will be necessary to consider the alternatives left open by a general verdict of guilty under such instructions of a trial judge.

IV. AT THE TRIAL, THE PROSECUTION DID NOT ADVANCE AND THE PETITIONER DID NOT DEFEND AGAINST THE THEORY OF THE PETITIONER'S GUILT ADOPTED BY THE COURT OF APPEALS.

The theory of the Government's case at the trial was that the joint net worth of the petitioner and his wife was greater at the end than at the beginning of each year in issue. At the conclusion of the Government's case, a revenue agent computed net worth increases for each year in issue and tax liabilities predicated upon such net worth increases without allocating the actual ownership of the various assets between the petitioner and his wife, a co-defendant. The language of the two previous sentences is taken almost verbatim from the second and third paragraphs of the opinion of the Court of Appeals (R. 258-259). In affirming the conviction, the appellate court found it unnecessary to consider the joint net worth of the petitioner and his wife as of any date. It did, on the other hand, charge the petitioner with the actual ownership of every asset described either generally or specifically in its opinion.

In reaching this conclusion, it relied almost exclusively on a written statement signed by the petitioner (Gov't Ex. 20, R. 42, 66, 123, 231-234) which it ruled to have been sufficiently corroborated to support the convictions in the District Court. Government's Exhibit 20 consisted of five typewritten pages bound together and each headed by the words "Daniel and Eva Smith." On the page containing a net worth statement, the petitioner signed and took oath to a sentence describing the compilation as a representation of "my true worth." The net worth statement generally and the phrase "my true worth" in particular formed the keystone of the affirmance by the Court of Appeals.

At the trial, as pointed out in the judge's charge, (R. 211) the Government endeavored to show through circumstantial evidence that the crime had been committed. This was in keeping with its bill of particulars, which stated that it would rely upon circumstances of increased net worth and expenditures (R. 9). At a hearing on the adequacy of the particulars, several months prior to trial, the prosecuting attorney said he had no evidence or proof as to which of the co-defendants had earned the allegedly unreported income. Defense counsel contended vigorously that each defendant was entitled to be treated separately and not as part of a taxable entity. The prosecution differed in its interpretation of the law and persisted in mingling the assets of the co-defendants, paying no attention to the actual ownership of the assets as between the co-defendants and computing asset and liability increases and decreases jointly. The propriety of this procedure was debated at some length (R. 138-150) as a foundation for defense objections to the joint computation of net worth increases presented by the revenue agent who summarized the evidence.

Precisely what was the prosecution theory at the trial?

Apparently that the joint net worth of the petitioner and his wife increased from year to year, that their joint net worth at the start was established by Exhibit 20 and that, whenever one of the couple acted, he or she acted as the agent for the other and with the full knowledge of the other. The many respects in which the prosecution fell far short of sustaining such a theory at the trial constituted the principal subject of the petitioner's brief before the Court of Appeals.

The net worth statement signed by the petitioner was used by the prosecution only during the testimony of the final witness, Agent Toohey, and chiefly in comparing the totals shown in the exhibit with the much larger totals on the blackboard. The net worth statement signed by the petitioner was never read to or circulated among the jury. The revenue agent had made a computation of the tax liability supported by Exhibit 20 prior to trial (R. 179-180), but it was never submitted to the jury for its consideration. The sentence containing the words "my true worth" was never read nor even alluded to at any time by prosecution, defense or judge.¹¹ If the prosecution considered the crucial words to mean that the assets listed in Exhibit 20 were owned beneficially by the petitioner, it is reasonable to expect that some claim to that effect would have been made by the prosecution at some stage of the proceedings in the District Court. But none ever was.

The opinion of the Court of Appeals refers to the contention of the petitioner that no significance was given to the phrase "my true worth" at the trial and that it was "unfair" for the Government to rely upon the phrase on

¹¹ In this Court, the petitioner must rely only on the silence of the record in support of these statements. In connection with the petition for rehearing in the Court of Appeals, supporting affidavits were filed.

the appeal.¹² The contention is disposed of by the court by pointing out that the petitioner had "ample opportunity to reveal the immateriality of the words" (R. 260). It appears that the Court of Appeals would have had the petitioner bring out from complete obscurity a very damaging bit of testimony and call it to the attention of the judge, the jury and the prosecution. The court would compel the defendant in a criminal trial to anticipate every argument which might conceivably be brought to bear against him and to present evidence in defense of such argument regardless of whether or not the prosecution presents it at the trial.

This position of the Court of Appeals is in strong contrast to that of Mr. Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 103 (1933) in which he strongly condemns the fundamental unfairness of using testimony "in an appellate court as though admitted for a different purpose, unavowed and unsuspected."

There was absolutely no avowal by the prosecution at the trial of the use to which the phrase "my true worth" would be put either by the Government on appeal or by the Court of Appeals in its opinion. The petitioner was

¹² The first time during the entire proceedings that the words "my true worth" were referred to was in the brief filed by the Government in the Court of Appeals. It was there argued that the phrase proved ownership by the petitioner of the assets listed in the statement, that some of these assets stood in the name of Eva Smith, and that it, therefore, could be inferred that the petitioner owned all of the assets which stood in the name of Eva Smith. The Government was not here advancing the theory adopted by the Court of Appeals, but was seeking to bolster the case it had presented in the trial court by showing that all of the circumstances of increased net worth there introduced into evidence could be attributed to the petitioner.

Petitioner's reply brief stated that this use of the phrase "my true worth" was fundamentally unfair, since it had never been suggested at the trial that the phrase would support such an inference, and that evidence not pressed upon the trial judge and jury should not be pressed upon the Court of Appeals.

given no reason to suspect that this phrase would turn out to be the core of the case against him.

The issues raised by the opinion of the Court of Appeals are more comprehensive, however, than those involved in the phrase "my true worth"; although the phrase is indispensable to the theory adopted in that court. It is hoped that it has been sufficiently demonstrated at this point in the brief that the theory on which the case was submitted to the jury was not the theory on which the Court of Appeals affirmed the conviction. The Court of Appeals did not affirm the verdict of guilty returned by the jury on the basis of the evidence on which the jury acted; the jury never considered the evidence before it in the frame of reference relevant to the theory of the Court of Appeals--in view of the instructions of the trial judge the jurors could not have considered the evidence in that light.

In *Hormel v. Helvering*, 312 U.S. 522, 556 (1941) the Court enunciated principles applicable to the case now before it. In the *Hormel* case the Board of Tax Appeals had reversed a determination of a tax deficiency, holding that income from a trust was not taxable to the petitioner under either § 166 or § 167 of the Internal Revenue Code, 26 U.S.C. §§ 166, 167. In the Court of Appeals the Commissioner relied primarily on neither of these sections, but upon § 22(a) of the Code, 26 U.S.C. § 22(a), as interpreted by the Court in *Helvering v. Clifford*, 309 U.S. 331 (1940), and the Court of Appeals upheld the Commissioner on that basis. The question before the Supreme Court was then whether or not the court below had been justified in relying on § 22(a).

In the course of deciding that question, the Court stated (312 U.S. at 556):

"Ordinarily an appellate court does not give consideration to issues not raised below. For our pro-

cedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

The Court then held, however, that it was so clear that § 22(a) applied that it would not serve the ends of justice to permit the petitioner to escape the tax and uphold the decision of the Court of Appeals. It did recognize, though, that the petitioner had not had an opportunity to present evidence before the trier of fact on the issue on which the case was decided and accordingly directed the lower court to remand the case to the Board of Tax Appeals for such an opportunity.

In the case at bar, the petitioner submits that he should be permitted to offer evidence and present arguments at a new trial on the new issues framed by the opinion of the Court of Appeals: (a) whether the petitioner owned beneficially the assets listed in the net worth statement signed by him; and (b) whether the petitioner's individual net worth increased by reason of the asset acquisitions reflected by the statement. On the issue of beneficial ownership, consider for example the evidence in the record pertaining to the brick building on Bartlett Street, Worcester: it was deeded to Eva, the petitioner's wife (Def. Ex. O; R. 178, 239); a purchase money mortgage executed contemporaneously with the deed related to the petitioner only to the extent that he released his rights of courtesy (Def. Ex. O; R. 178, 243); the amount of the mortgage entered on Exhibit 20 is \$34,000, whereas the face of the mortgage indi-

cates that the loan was only \$33,000 (R. 241); the finances pertaining to the building were handled by Eva's brother (R. 44) through a commercial bank account in the name of Bartlett Street Realty Company opened by Eva and her brother (R. 39). On the basis of this evidence, a persuasive argument could have been advanced at the trial and on appeal that beneficial ownership of this building was proved to have been in Eva and not in the petitioner. But no such argument was ever made. Additional evidence might well have been offered.¹³ As regards the issue whether Exhibit 20 proved that the petitioner's individual net worth increased during the years listed, an example has already been demonstrated: the increase of \$11,213.48 for 1946 is the result of a mistake to the extent of \$9,600.00.

The principles set forth in this section of the argument are not new; for example, the general law in the area has been summarized in Note, *Raising New Issues on Appeal*, 64 Harvard L. Rev. 652 (1951). The point arises most often in civil cases. Its presence in criminal cases is usually due to an attempt by the defendant to introduce a new issue. In such cases, the courts are normally lenient because of the comparative hardship on the defendant if the new issue is not heard. Where it is not the defendant, but the prosecution, who raises the new issue, the same factors should operate to restrict the raising of the new issue, or, at the least, to send the case back for a new trial. In *Pearson v. United States*, 192 F.2d 681 (6 Cir. 1951), for example, the court refused to sustain a conviction on a theory not advanced by the Government at the trial, primarily on the

¹³ For instance, since 1946 there has been on file at the office of the Clerk of the City of Worcester, in Book 195, Page 490, a "Certificate of Married Woman Doing Business on Separate Account" executed by the petitioner's wife and authorizing her to do business on her separate account as the Bartlett Street Realty Company. This fact was known to the petitioner's attorney at the time of the trial, but no evidence of it was offered.

ground that the charge to the jury did not treat with that theory. In *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949) this Court agreed with the petitioner that the Court of Appeals could not sustain a conviction on a new theory where the fact issues arising out of that theory had not been submitted to the jury.

In summary, petitioner believes that this Court has well expressed what the petitioner believes to be the principle applicable to this case in *Bollenbach v. United States*, 326 U.S. 607, 614 (1946):

"In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trial in federal courts."

CONCLUSION

The judgment of the Court of Appeals should be reversed and the following orders made depending on the Court's decision of the questions discussed in this brief:

(a) that a judgment of acquittal be entered on the grounds that there was insufficient independent evidence corroborating the starting position and that the net worth statement signed by the petitioner was inadmissible in evidence.

(b) that the petitioner be granted a new trial on the grounds that an improper procedure was followed in admitting in evidence the net worth statement signed by the petitioner and that the theory upon which the Court of

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Appeals sustained the conviction was never tried out in the District Court.

(c) that the case be remanded to the Court of Appeals on the ground that it failed to consider the sufficiency of the circumstantial evidence.

Respectfully submitted,

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